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Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

and

TEAMSTERS LOCAL UNION 657,
Petitioners,

v.

OVERNITE TRANSPORTATION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

G. WILLIAM BAAB *
SANFORD R. DENISON
BAAB & DENISON, L.L.P.
Stemmons Place, Suite 1100
2777 N. Stemmons Freeway
Dallas, Texas 75207-2284
(214) 637-0750

JAMES L. HICKS, JR.
JAMES L. HICKS, JR., P.C.
Stemmons Place, Suite 1100
2777 N. Stemmons Freeway
Dallas, Texas 75207-2284
(214) 630-8621

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether an employer's state law claim of tortious interference with customer relations, based on unions' peaceful distribution of handbills containing allegedly defamatory statements, is preempted by Sections 7 and 8(b)(4) of the National Labor Relations Act, Title 29 U.S.C. §§ 157 and 158(b)(4), under the broad preemption doctrine enunciated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)?

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IN THE

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No. ____

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

and

TEAMSTERS LOCAL UNION 657,

Petitioners,

v.

OVERNITE TRANSPORTATION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

International Brotherhood of Teamsters, AFL-CIO and Teamsters Local Union 657 pray that a writ of certiorari issue to review the decision and judgment of the Texas Supreme Court (and in the context of the Texas Supreme Court's refusal of review, the decision and judgment of the Court of Appeals for the Third District of Texas) in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Teamsters Local Union 657 v. Overnite Transportation Company*, No. 01-0393 (Supreme Court of Texas) (September 20, 2001).

DECISIONS BELOW

The decision of the Supreme Court of Texas denying petition for review was without opinion and is not reported. It is reproduced as Appendix C in the appendix to this Petition ("Pet. App.") at 11a-12a. The Opinion and Judgment of the Court of Appeals for the Third District of Texas in Case No. 03-00-00390-CV, dated March 29, 2001, is unreported and unpublished, and is reproduced as Appendix B at Pet. App. 3a-10a. The Texas State Trial Court's Order Granting Partial Summary Judgment in Cause No. 99-11702, dated February 24, 2000, is unreported and unpublished, and is reproduced as Appendix A at Pet. App. 1a-2a.

STATEMENT OF JURISDICTION

The Supreme Court of Texas' judgment denying petition for review was entered on September 20, 2001. This Court has jurisdiction under Title 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, Title 29 U.S.C. § 157 governs the right of unions and employees to engage in peaceful organizational activity. Its full text is set out in Appendix D at Pet. App. 13a.

Section 158(b)(4) of the National Labor Relations Act, Title 29 U.S.C. § 158(b)(4) governs unions' right to make peaceful appeals to third parties in the context of a labor dispute. Relevant text is set out in Appendix D at Pet. App. 13a-14a.

STATEMENT OF THE CASE

A. Proceedings In The State Trial Court

1. *Introduction.* This case arose out of an ongoing, nationwide labor dispute between Overnite Transportation Company ("Overnite"), various teamster local unions

including Petitioner Local 657 ("Local 657") and Petitioner International Brotherhood of Teamsters, AFL-CIO ("IBT"). (CR 2-7).[1] The dispute involved teamster local unions' campaign to organize Overnite employees and to negotiate an initial collective bargaining agreement with Overnite.

2. *Proceedings in the State Trial Court.* Overnite sued IBT and Local 657 alleging claims of defamation and tortious interference with customer relations based on the unions' peaceful distribution of handbills (fliers) to Overnite's Texas customers. (CR 2-7). The handbills stated (falsely, Overnite alleged) that the National Labor Relations Board had found Overnite guilty of hundreds of labor law violations, including discrimination, intimidation and retaliation against workers. (CR 6). Overnite contended that distributing the allegedly defamatory handbills to its customers injured its business relations and contracts. (CR 7).

Local 657 and IBT moved for summary judgment on Overnite's tortious interference claim, contending that their acts were justified and that in any event the National Labor Relations Act preempted Overnite's claim. (CR 24-25, 47-49; Pet. App. 5a). The trial court granted the Motions for Summary Judgment without stating its ground and severed the tortious interference claim, making the partial summary judgment as to Overnite's claim of tortious interference final for appeal. (CR 30; Pet. App. 1a-2a, 5a). Overnite appealed.

B. The Decision Of The State Court Of Appeals

The State Court of Appeals ("Court of Appeals") acknowledged the general, controlling principle articulated by the United States Supreme Court: "'[w]hen an activity is

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[1] Reference to the record in the Texas Court of Appeals for the Third District is by the notation "CR" followed by pagination. References to the Court of Appeals' Judgment and Opinion are by the notation "Pet. App." followed by pagination.

arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.' *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)." (Pet. App. 8a). However, the Court of Appeals then determined that IBT and Local 657 had failed to establish that Overnite's claim of tortious interference was preempted because: (a) they "were required [and failed] to show that handbilling based on defamatory statements is protected"; and (b) although they cited authority analyzing whether certain union activities are prohibited under Section 158, they had "fail[ed] to articulate a cogent legal basis for preemption." (*See* Pet. App. 9a). The Court of Appeals concluded that IBT and Local 657 had "not carried their burden to show that they are entitled to judgment on that ground [preemption] as a matter of law." (Pet. App. 9a). On this rationale, the State Court of Appeals reversed and remanded the District Court's grant of summary judgment on behalf of IBT and Local 657 against Overnite's claim of tortious interference. (Pet. App. 10a). IBT and Local 657 filed a Petition for Review with the Supreme Court of Texas.

C. The Texas Supreme Court's Refusal To Review

The Supreme Court of Texas denied without opinion the Petition for Review filed by IBT and Local 657, presenting a final judgment for purposes of review by this Court on Petition for Writ of Certiorari.[2]

REASONS FOR GRANTING THE WRIT

In the context of the Court of Appeals' holding that Overnite's claim of tortious interference with customer

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[2] No review was sought as to the Court of Appeals' disposition concerning the affirmative defense of justification.

relations is not preempted by the National Labor Relations Act, this case presents an important, unresolved issue which should be considered and decided by this Court.

I. Law Governing The National Labor Relations Act's Preemption Of State Court Claims.

The controlling framework for determining whether particular state law claims are preempted by the National Labor Relations Act was established by the United States Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959). It is for the National Labor Relations Board, and not the courts, to decide whether a particular controversy falls within the scope of sections 7 or 8 [3] of the National Labor Relations Act:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.
>
> . . . .
>
> . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

Garmon, 359 U.S. at 244-46. Quoting *Garmon*, the Fifth Circuit in *Kaufman, et al. v. Allied Pilots Association,*

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[3] Sections 7 and 8 of the National Labor Relations Act are codified as Sections 157 and 158 respectively of Title 29 of the United States Code. *See* Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 157, 158 (West 1998). Section 157 of the Act confers rights on employees regarding labor organizations, while Section 158 describes unfair labor practices by both employers and labor organizations.

et al., No. 00-11223, 2001 WL 1485575 (5th Cir (Tex.)), in finding a state tortious interference with contract claim preempted, stated:

> Preemption is necessary because "the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated policy of industrial relations . . . ." [*Garmon*, 359 U.S. at 243]. Concerned with "conflict in its broadest sense" the Court eschewed a focus on the type of state regulation or claim, and adopted an approach that looks to the "nature of the activities which the states have sought to regulate." [*Id.*]

Kaufman, 2001 WL 1485575 at *2.

Clearly, the preemptive principle is a broad one [4]—broader than the Court of Appeals acknowledged. Contrary to the statement of the Court of Appeals, preemption is *not* dependent on initial "proof" in the trial court that the subject

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[4] *Garmon* carved out two limited exceptions to the preemption doctrine. *Garmon*, 359 U.S. at 243-44. *See also Kaufman*, 2001 WL 1485575 at *2. First, the *Garmon* Court stated that preemption would not attach to conduct which "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of a power to act." *Garmon*, 359 U.S. at 244. These cases will typically involve "conduct marked by violence and imminent threats to the public order." *Id.* at 247. *See also United Auto Workers v. Russell*, 356 U.S. 634 (1958). There is no allegation of violence in this case. The second exception recognized by *Garmon* relates to conduct which is of "merely peripheral concern to federal labor law." *Garmon*, 395 U.S. at 243. An example is seen in *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), where a claim that a union maliciously defamed a managerial employee in the course of an organizational campaign was characterized as of "merely peripheral concern to federal labor law." *Id.* at 61. Peaceful union persuasion of an employer's customers in the course of a labor dispute cannot fairly be characterized as "merely peripheral . . . to federal labor law." As discussed in the text, *infra*, pp. 7-10, Sections 7 and 8(b)(4) directly regulate such conduct.

activity is protected. "*Garmon* preemption does not depend on the merits of an adjudication of the conduct's legality under federal law . . . ." *Kaufman*, 2001 WL 1485575 at 3. By requiring proof on the merits that the activity was protected before it would find preemption, the Court of Appeals usurped the authority Congress gave to the National Labor Relations Board to determine what conduct is protected by federal labor law. This is exactly what state courts are prohibited from doing by *Garmon* and its progeny.

II. Peaceful Handbilling In The Context Of Union Organizational Activity, Such As That Involved Here, Is Activity Presumptively Protected By Section 7 Of The National Labor Relations Act, And Is Subject To Regulation By The National Labor Relations Board In Interpreting And In Applying Sections 7 And 8 Of The Act.

Peaceful handbilling conducted by union representatives and members in the context of an organizational campaign or labor dispute has historically been regarded as presumptively within the protection of Section 7 of the National Labor Relations Act. *See, e.g., Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527, 531-37 (1992); *National Labor Relations Board v. Babcock & Wilcox, Co.*, 351 U.S. 105, 109-113 (1956). In analyzing the legality of handbilling when directed to customers or consumers of a primary employer (such as Overnite) with whom a labor dispute exists, attention has been turned to the "proviso" [5] to Section

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[5] The referenced statutory wording (the proviso to Section 8(b)(4)) states in relevant part: "nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . ." 29 U.S.C. § 158(b)(4).

8(b)(4) of the Act stating that union appeals to such persons (customers or consumers) are not prohibited if they "truthfully advise" of the nature of the dispute with the primary employer. In dealing with the ultimate legality of peaceful handbilling directed to or concerning customers or other employers doing business with a primary employer such as Overnite, the National Labor Relations Board ("the Board") and Supreme Court have applied the publicity proviso and have determined whether the handbilling is "protected" by the publicity proviso or instead "coercive" in violation of Section 8(b)(4).[6] *See generally Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 578-88 (1988); *National Labor Relations Board v. Servette, Inc.*, 377 U.S. 46, 54-56 (1964). *See also Hospital and Service Employees Local 399*,

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[6] The Court of Appeals cited *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 190 (1978) for the proposition that the preemption doctrine is applied differently depending upon whether the conduct is "arguably prohibited" or "arguably protected." (CR 4-5). Asserting, albeit incorrectly, that IBT based its claim for preemption only on the "arguably protected" nature of the conduct at issue, and that IBT only cited cases addressing "arguably prohibited" conduct, the Court of Appeals concluded that IBT had "fail[ed] to articulate a cogent legal basis for preemption . . . ." (CR 5). However, even assuming IBT's claim to preemption rested only on the arguably protected nature of the conduct, there exists no basis in *Sears* or elsewhere in this Court's jurisprudence to conclude that the preemption doctrine is applied differently depending upon whether the conduct at issue is arguably protected or arguably prohibited. "The fundamental precept of *Garmon* is that liability under a state cause of action is preempted whenever it poses a serious risk of *conflict* with national labor policy." *Mobile Mechanical Contractors v. Carlough*, 664 F.2d 481, 487 (5th Cir. 1981) [emphasis added]. That potential for conflict exists whether the conduct at issue is arguably protected or prohibited. As the Fifth Circuit noted in *Kaufman*, when state regulation of conduct poses a risk of conflict with federal labor policy "both prohibited and protected conduct are shielded from liability under state law." *Kaufman*, 2001 WL 1485575 at *3.

293 NLRB 602, 602-03 (1989), on remand from *Hospital and Service Employees Local 399 v. NLRB*, 743 F.2d 1417 (9th Cir. 1984). In the context of determining whether or not handbilling "truthfully advises" interested parties and is therefore entitled to the protection of the publicity proviso, the Board itself has suggested that whether or not information contained in a handbill is "false or misleading" may be relevant and has analyzed such allegations and content in determining whether or not use of the information tended to be misleading as to the nature of the primary dispute. *See Hospital and Service Employees Local 399*, 293 NLRB at 602 n. 3:

> In the absence of evidence that the information itself was false or misleading, the Board presumed that the CAB and NTB handbill data was factually accurate. However, the Board found that the use of the information tended to be misleading as to the nature of the primary dispute. See 263 NLRB 997 fn. 7 and 998. In affirming the Board's conclusion that the handbills were not protected by the publicity proviso, the court of appeals found it unnecessary to decide this latter issue. [*Hospital and Service Employees Local 399*], 743 F.2d at 1425 n. 5.

The Board continues to analyze the truth or falsity of handbilling information in determining whether the handbilling is "protected" on the one hand or "prohibited" on the other. *See Iron Workers Local 386*, 325 NLRB No. 141, 158 LRRM 1180 at 1186 (1998), enforcement denied on other grounds, 182 F.3d 948 (D.C. Cir. 1999). Clearly, analysis of the truth or falsity of the contents of peaceful handbilling directed at the customers of a primary employer (such as Overnite) is very much the grist of the National Labor Relations Board's mill in analyzing whether such handbilling is protected by Section 7 and the publicity proviso to Section 8 on the one hand, or prohibited by Section 8 on the other. The Court of Appeals' analysis does not acknowledge

the Board's ongoing interest in the truth or falsity of peaceful handbill content, and does not apply preemption law in that context.

III. Existing Case Decisions Have Not Squarely Addressed And Resolved The Preemption Issue Presented Here.

In *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), the United States Supreme Court held that a state court *libel* action was not preempted, although based upon statements made by a union during a union organizing campaign. But the Supreme Court in *Linn* very carefully restricted the holding of that case to its facts: "[t]he question before us . . . involve[s] the extent to which the National Labor Relations Act, as amended, supersedes state law with respect to *libels* published during labor disputes." *Id.* at 57. (Emphasis added). The limitation of the Court's holding to libel actions was repetitively stated. *Id.* at 58, 67. Here, Overnite receives full benefit of the holding in *Linn* by the continued pendency of its defamation claim in the District Court.

Nothing in *Linn* addresses a separate claim of tortious interference with customer relations—a claim which focuses on union handbilling addressed to and concerning the customers of Overnite. As shown above, a claim grounded in peaceful union organizational handbilling addressed to the customers of the primary employer, with whom the union has a labor dispute, has typically been the topic of Board and Court analysis in determining whether or not such handbilling is protected by Section 7 and Section 8's publicity proviso on the one hand or prohibited by Section 8 on the other.

This Court has long held that federal labor law displaces state law and claims as to peaceful picketing activity directed at an employer's customers. *See Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964). We know of no decided case

which squarely addresses and decides whether or not an allegation that peaceful union handbilling contains (allegedly) malicious, defamatory statements saves a state court claim of tortious interference with customer relations from *Garmon* preemption. Three (3) existent cases, *B E & K Construction Co. v. United Brotherhood of Carpenters*, 90 F.3d 1318, 1328-30 (8th Cir. 1996), *Mobile Mechanical Contractors v. Carlough*, 664 F.2d 481 (5th Cir. 1981) and *Hennepin Broadcasting Associates, Inc. v. N.L.R.B.*, 408 F. Supp. 932, 937 (D.C. Minn. 1975), hold that claims of tortious interference based upon peaceful picketing appeals to third parties are preempted; however, none involves or treats allegations that the appeals contain malicious, defamatory statements or information.

A case decided by the United States Court of Appeals for the Third Circuit is instructive. In *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n*, 90 F.3d 797 (3d Cir. 1996), one nurses' union sued another on the basis that the second union had "promulgated false, malicious, and defamatory propaganda designed to destroy the reputation of [the first union]" in the context of a union organizational campaign involving the competing unions. *Id.* at 800. The district court held that state court claims of defamation were *not* preempted, but determined that claims alleging "interference with present and prospective contractual relations" between the allegedly defamed union and former representatives, local units and contracting employers *were* preempted. The Third Circuit carefully analyzed existing law governing preemption under the National Labor Relations Act, and the nature of the state court tort claims involved, emphasized that the alleged wrongful conduct occurred in the context of an organizing campaign, and concluded that the state court tort claims involving interference with contractual relations: (1) involve activity actually or arguably prohibited by the National Labor Relations Act; (2) did not involve an issue deeply rooted in local feeling and responsibilities; and

(3) would risk substantial interference with the jurisdiction of the National Labor Relations Act were it litigated in the state courts. *Id.* at 801-05. The Third Circuit panel majority then *affirmed* that state tort claims of interference with contractual relations based on allegations of "malicious, defamatory statements" *were* preempted. *Id.* at 805.[7]

In *Pennsylvania Nurses Ass'n*, the Third Circuit recognized the separability of state court libel/defamation claims governed by *Linn* on the one hand and tortious interference with third-party relations on the other. The Third Circuit also recognized that the National Labor Relations Act broadly regulates a union's peaceful conduct in the context of a union campaign—and that state regulation of such conduct should not be extended beyond *Linn*. Whether or not this Court ultimately agrees with the preemption analysis of the United States Court of Appeals for the Third Circuit in the referenced case, that decision involves state court tort claims strikingly similar to Overnite's claim of tortious interference with contractual relations, and proves that a substantial question worthy of review is presented.

IV. Summary.

The bottom line is this: the union conduct at issue—peaceful, written persuasion of the customers of an employer with whom the union has a labor dispute—has been regulated by Congress in Sections 7 and 8(b)(4) of the NLRA. Overnite, and the State Court of Appeals, seek to displace the National Labor Relations Board's power to adjudicate claims based on this conduct by the artifice of a particular state cause of action—tortious interference with customer relations. Any defensible state interest in regulating this subject matter—

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[7] At the same time, the Third Circuit declined to find that a state claim of defamation was preempted, applying *Linn* narrowly as we have suggested it should be. *See Pennsylvania Nurses Ass'n*, 90 F.3d at 805-06.

recognized by *Linn*—is preserved by the libel/defamation claim which continues to pend in state court. The exercise of state jurisdiction over the separate claim of tortious interference with customer relations offends basic *Garmon* principles. A writ must be granted to resolve this issue and redress this wrong.

CONCLUSION

For the reasons stated, a Petition for Writ of Certiorari to the Supreme Court of Texas should be granted.

Respectfully submitted,

G. WILLIAM BAAB *
SANFORD R. DENISON
BAAB & DENISON, L.L.P.
Stemmons Place, Suite 1100
2777 N. Stemmons Freeway
Dallas, Texas 75207-2284
(214) 637-0750

JAMES L. HICKS, JR.
JAMES L. HICKS, JR., P.C.
Stemmons Place, Suite 1100
2777 N. Stemmons Freeway
Dallas, Texas 75207-2284
(214) 630-8621

* Counsel of Record

Counsel for Petitioners